IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.633 OF 1986

Namdeo Sayaji Dhavale ...Appellant

vs.

Shivaji Namdeo Chavhan ...Respondent

Mr.A.A.Kumbhakoni for the Appellant
Mr.Borkar for the Respondent.

CORAM: A.S.OKA,J.
DATE : FEBRUARY 24, 2005.

ORAL JUDGMENT:

1. Shri A.P.Kulkarni appearing for the respondent states that Shri Borkar has filed Vakalatnama for the Respondent and therefore he may be discharged. Shri Borkar states that he will file Vakalatnama within one week. In view of this position, Shri Kulkarni is permitted to withdraw his Vakalatnama.

2. The Second Appeal was admitted on 21st October 1986 by passing following order :

"Heard Shri Panse for the appellant.

Admitted on the questions of law enumerated in ground No.11."

3. Though this Court did not specifically frame any

substantial question of law, it is obvious that this Court was of the view that the questions set out in ground No.11 was the substantial question of law. Ground No.11 read thus :

"(1) Whether the suit document is a mortgage or it is an agreement to sell.

(2) Whether both the Courts failed to settle the issue, whether the Defendant intended to execute a mortgage or a document of security though ostensibly he executed he executed the agreement of sale.

(3) Whether the suit agreement is void under Section 31 (1) and (2) of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act and Rule 27 of the Rules under the Act.

(4) Whether the suit contract is void for the Plaintiff was minor on the date of its execution.

(5) Whether the suit was time-barred.

(6) Whether specific performance ought not to have been enforced having regard to the provisions of Section 16(c) of the Specific Relief Act.

(7) Whether specific performance ought not to have been enforced having regard to Section 20(2) (a) (b) (c) of the Specific Relief Act.

4. The Appeal is by the original Defendant challenging the decree for specific performance of agreement for sale of immovable property passed in favour of the

Respsondent-Plaintiff and confirmed by the District Court.

5. The Respondent filed a suit for specific performance of registered agreement for sale dated 19th June 1974. The agreed consideration as mentioned in the agreement was Rs.9000/- and earnest money of Rs.8000/- was paid by the Respondent to the Appellant. It is not in dispute that the respondent was put in possession of the property subject matter of the agreement.

6. The learned Counsel for the Appellant submitted that the Respondent came to the Court with a plea that he has made further payment of Rs.1000/-. He pointed out that the said case made out by the Respondent could not be established by him and in fact the Trial Court has specifically disbelieved the same. He submitted that in view of principles incorporated in Section 20 of Specific Relief Act, 1963, relief of specific performance is a purely discretionary relief. He submitted that as the Respondent-Plaintiff made out a false case regarding payment of balance consideration of Rs.1000/-, the discretion should not have been exercised in favour of the respondent.

7. The Judgment of the first Appellate Court shows that this contention was not raised before the Appellate Court. Perusal of the Memorandum of Appeal filed by the appellant in the first Appellate Court does not show that the ground based on

the said contention was taken. Therefore, it is not open for the Appellant to raise the said contention in the Second Appeal.

8. It is to be noted here that admittedly more than 80% of agreed consideration was received by the Appellant under the registered agreement for sale and the Appellant was put in possession. In view of this admitted position, discretion under Section 20 of Specific Relief Act, 1963 has been exercised in favour of the Respondent. No fault can be found with the exercise of discretion. Second appeal is dismissed with no order as to costs.

JUDGE.